It is unnecessary to consider what is the distinction if any between the two principles invoked in the terms in which they have been stated. It is enough to say, that whether there be two principles or one principle they or it must yield to a sufficient indication of intention to override the pre-existing specialty.

Their Lordships are satisfied that in the present case there is ample indication on the face of the enactment of an intention that the rules to be made under it should be wide enough to apply to every case, indeed, it was essential to the very purpose of the enactment that this should be so. In the circumstances their Lordships are of opinion that the scope of the enactment is such that the rules under it are *intra vires* and wide enough to cover the appellants.

The second ground of appeal under which the appellants seek if the enactment and rules are held to apply to them to recover damages from the State is rendered difficult by another consideration.

It is admitted that an action for breach of covenant can be maintained against the respondent, but it is said by the respondent that the action which the appellants contemplate is expressly prohibited by Section 5 of the enactment.

In their Lordships' opinion such an action would, within the meaning of Section 5, be a suit against one of the Federated Malay States in respect of a matter or thing arising under or resulting from the operation of the Enactment or the Rules made thereunder and could not therefore be maintained.

Having regard to the views which their Lordships entertain and have expressed as to the meaning and effect of the enactment and the rules made thereunder, it is unnecessary to consider how far the appellants' contention as to the effect of the lease are well founded and their Lordships must not be taken to express any opinion in relation thereto.

In the result, therefore, this Appeal, in their Lordships' opinion, fails and must be dismissed and their Lordships will humbly advise His Majesty accordingly.

The costs of the Appeal must be paid by the appellants.

Appeal dismissed.

Solicitors for the Appellants—*Pooley & Co.*, Kuala Lumpur, for *Drew & Napier*, Singapore; *Linklaters Pains*, London.

Solicitors for the Respondent—*The Hon'ble Mr. W. S. Gibson, Legal Adviser*, Federated Malay States; *Burchells*, London.

[APPELLATE CIVIL JURISDICTION]

TERRELL, Ag. C.J., WHITLEY & McFALL, JJ.

April 20, 1933.

LAU YAU WENG
LAU YAU CHI .....**Appellants**

vs.

THE BANK OF MALAYA, LTD....Respondents

[PERAK CIVIL APPEAL No. 1 of 1933]

Notice to chargor — Service — Land Code, 1926, section 138—Waiver of irregularities in form of notice by voluntary appearance of chargor.

On the 24th February 1931, land was transferred to the appellants subject to a charge in favour of the respondents. Default in payment was made and, on the 19th September, 1932, a notice under section 138 of the Land Code, 1926, which was not in the proper form, was served on the first appellant. This notice was sent by registered post to the second appellant, returned undelivered and a copy posted on the land under the provisions of section 138 (v).

On the 16th January, 1933, at the hearing of the summons under section 149, the first appellant appeared in person and the second defendant by his attorney. On this date the power of attorney had not been registered in the Federated Malay States but any objection to this was waived by the chargees.

The order for sale made on the summons was not perfected until the 21st February, 1933, and on this date the first and second appellants appeared by their solicitor to settle the form of the order. In the meantime, on the 7th February, 1933, the power of attorney was duly registered in the Federated Malay States.

On the 9th February, 1933, the first appellant and the second appellant, by his attorney, gave notice of appeal. The memorandum of appeal set out the following grounds:—

(1) That the notice served on the 19th September, 1932, was not a proper notice under section 138 of the Land Code;
(2) that the notice was not properly served on the second appellant; and
(3) that the Summons in Chambers was not properly served on the second appellant, as the power of attorney had not been registered.

Held, that before service can be effected under Section 138 (v) of the Land Code, 1926, a chargee must adduce evidence that all the methods of service prescribed in sub-sections 138 (i), (iii) and (iv) had failed or were not open to him.

Held, that the first appellant by appearing in person at the hearing of the Summons in Chambers and not objecting to the form of the notice had waived this irregularity.

Held, (by Terrell, Ag. C.J., and Whitley, J. and McFall, J., dissenting) that the second appellant by registering his power of attorney on the 7th February, 1933, and voluntarily appearing, by Counsel, on the 21st February, 1933, to settle the terms of the order on the summons, had waived any irregularities, and the order made on the summons could not be questioned by him on appeal.

Decision of Gerahty, J., affirmed.

Supramanian Chetty v. *Mohamed Ibrahim*, 3 F.M.S. L.R. 91, followed.

K. M. Coomarasamy for the appellants.

G. Terrell for the respondents.

Cur. Ad. Vult.

TERRELL, AG. C.J. — This is an appeal against the order of Gerahty, J., directing a sale, under section 149 of the Land Code, of land held under Certificate of Title No. 7589 in the Township of Ipoh in the District of Kinta, and charged to the Bank of Malaya, by charge dated the 2nd of April, 1927.

The chargor was Lin Pui Yew, the surviving executrix and representative of the estate of Low Foo deceased. On the 24th of February, 1930, the land was transferred to Lau Yau Weng and Lau Yau Chi, hereinafter referred to as the first and second appellants respectively, as the proprietors subject to the charge.

On the 31st of March, 1932, default was made in payment of the principal sum due. On the 19th of September, 1932, the Liquidators sent to the first and second appellants and to Lin Pui Yew a notice of demand, under section 138 of the Land Code.

The notice was in the form provided by schedule XXIX of the Land Code, and is addressed to Lin Pui Yew as chargor. This form is not applicable where the land has been transferred subject to a charge in accordance with section 128 of the Land Code, as section 138 of the Land Code requires the notice to be given to the chargors, and 'chargors' within the meaning of the Code, are the transferees and not the original chargors. *Prima facie*, therefore, the notice was defective. The notice was duly served on the first appellant and on Lin Pui Yew, but was sent by registered post to the second appellant at Penang, and was returned undelivered. Accordingly, on the 26th of September, 1932, a copy of the notice was posted on the land, under the provisions of section 138 (v) of the Land Code.

In due course the summons was served under section 149, and to this summons the first appellant appeared in person, and the second appellant appeared by his attorney Leong Yoon Yin. The Summons came on for hearing on the 16th of January, 1933. At the hearing it appeared that the power of attorney had not been registered in the Federated Malay States, and that accordingly the attorney was not entitled to represent the second appellant on the summons. The chargees, however, waived this objection.

The order was not perfected until the 21st of February, 1933, as objections were taken to the form of the order. In the mean time on the 7th of February, 1933, the power of attorney was duly registered, and on the 9th of February, 1933, the first appellant, and the second appellant by his attorney, gave notice of appeal. On the same day the appellants filed their memorandum, and appointed Mr. Coomarasamy as their solicitor in the matter.

The new Originating Summons Rules do not apply to this application and it was not, therefore, necessary for the appellants to enter an appearance.

The memorandum of appeal sets out three grounds of appeal:—

(1) that the notice served on the 19th September, 1932, was not a proper notice under section 138 of the Land Code;
(2) that the notice was not properly served on the second appellant; and
(3) that the summons in chambers was not properly served on the second appellant, as the power of attorney had not then been registered.

It is to be observed that all these objections could have been raised at the hearing of the Summons in Chambers, but none of them were in fact raised, no objections whatever having been taken to the form of the proceedings. On the appeal, counsel for the respondent took the preliminary point that a Court of Appeal will not hear an appeal based entirely on technicalities which could have been, but were not, raised in the Court below.

Before dealing with this point I will consider the sufficiency of the notice, the service of the notice, and the service of the summons.

As regards the notice, as I have said, section 138 requires the notice to be given to the 'chargor,' and in section 2 the 'chargor' is defined as the registered proprietor of the land. The notice does not set out the whole transaction, being silent on the matter of the transfer to the appellants, and recites *inter alia*—"whereas you (*i.e.*, Lin Pui Yew), the chargor have made default, etc.,"—though in fact the appellants are the chargors. Under the Registration of Titles Enactment 1911, the notice had to be given to the original chargor even where there had been a transfer; and in the case of *S. R. M. M. A. Supramanian Chetty* v. *S. P. Mohamed Ibrahim*, 3 F.M.S.L.R. 91, objection was taken that the notice was defective in that it was addressed to the transferees, and not to the original chargor. In that case, however, the whole transaction was accurately set out (see page 94), and the only objection was that the notice was addressed to the transferee, instead of to the transferor. The notice was served by posting on the land, and no objection was taken to the method of service.

The Court of Appeal held that the error in the form of the notice did not, on the facts of that case, invalidate the subsequent proceedings.

The case now before the Court bears certain resemblances to the one quoted above. In that case, under the Registration of Titles Enactment,

the notice had been given to the original chargor and was in fact addressed to the transferee, while in this case, under the Land Code, the notice had to be given to the transferee, but was addressed to the original chargor. In this respect the one case is the converse of the other. But there are also some important differences. In the reported case the notice though addressed to the wrong person accurately set out the whole transaction; in the present case it did not. Again, in the reported case the notice was served by posting on the land, and there was no evidence that it was brought to the notice of the original chargor—he was not served and did not appear on the summons for sale; in the present case the first appellant was served personally, both with the notice and with the summons, and duly appeared. The second appellant was not served personally, but the notice was posted on the land, the summons was served on his attorney, and the attorney in fact appeared on the summons, though the power of attorney had not been registered.

As regards service of the notice, no question arises as regards the first appellant because, as I have said, the notice was served on him personally. As regards the second appellant different considerations arise. The method of service is provided for by section 138 sub-sections (i), (iii), (iv) and (v). The effect of these provisions is as follows:—

The notice may either be served personally under sub-section (i), or left at the usual or last known place of the abode or business of the chargor in the Federated Malay States, under sub-section (iii). These two methods are alternative, and either method may be adopted when the chargor lives or carries on business in the Federated Malay States. If, however, the chargor is absent from the Federated Malay States, or cannot be found, the notice may be served on his attorney or left with an adult member of the family under sub-section (iv). I take it that this only refers to an attorney or family actually in the Federated Malay States, but the sub-section is not clear on this point. If all these methods fail, or are not available, notice may be given by service on the land under sub-section (v). The respondent alleges that this is the manner in which service was effected on the second appellant.

Now, before the Court can act under section 149, it must be proved that there has been default in complying with the notice under section 138. The respondent attempts to prove service on the second appellant by the affidavit of S. Seenivasagam sworn on the 13th December, 1932, and supported by the affidavit of Chow Thin Fook sworn on 9th December, 1932. The former affidavit merely states that the notice was sent to the second appellant in Penang, but was returned undelivered, and that subsequently a copy of the notice was posted on the land. The other affidavit proves the posting on the land.

I have no doubt that the affidavit in support of the summons is defective. In view of the terms of section 138 (v) I think it is quite clear that the applicant should adduce evidence that all the methods of service prescribed in sub-sections (i), (iii) and (iv) had failed, or were not open to the applicant. It is quite possible that service by posting on the land was perfectly in order, but there is nothing on the affidavit to show that it was made.

Treating these two grounds of appeal together, there can be no doubt

(1) that the notice itself was irregular in form, and
(2) that service on the second appellant was irregular.

It follows that if the appellants had neither of them appeared on the summons, no order could have been made as, in the absence of the parties, it is essential that every detail of the Land Code be strictly complied with.

I think, however, that the irregularities were merely irregularities which could be waived. They were not such irregularities as would deprive the Court of any jurisdiction in the matter, and which could not be cured by waiver. The question, therefore, arises whether the irregularities were in fact waived.

It must be remembered at the outset that the provisions in the Land Code with regard to the form of notice and the method of service are intended to bring home to the persons interested in the land, that the person who is entitled to a charge, intends to enforce it, and the Code carefully provides how the object is to be achieved. In the absence of the parties, the Court will not presume that the proprietors have been made aware of the proceedings to enforce the security, unless the provisions of the Code have been strictly complied with. But it is always open to the parties interested to waive technical objections. As regards the first appellant I have held that the notice was defective in form, but even so, it certainly brought to his notice that, an order for sale of the land in which he was interested, would be applied for. The summons was duly served on him; he attended and raised no objection to the form of the notice. This irregularity, therefore, was waived.

As regards the second appellant, there was the irregularity in the form of the notice, and irregularity in the proof of service. There was a third irregularity in the service of the summons upon his attorney when the power of attorney had not yet been registered (see Powers of Attorney Enactment, 1912, section 3). When, therefore, the attorney appeared on the 16th February, 1933, his appearance was ineffective,

and could not operate to waive the previous irregularities. If the second appellant objected to the order, which must be taken to have been made in his absence, he should at once have applied to set it aside under the inherent jurisdiction of the Court (section 612 of the Civil Procedure Code), or to have it reviewed under Chapter XLIX. The second appellant, however, did not adopt this course. What he did was to have his power of attorney registered on the 7th February, 1933. Then on the 9th February he gave notice of appeal, and appointed Mr. Coomarasamy as his solicitor. The order of the 16th January, 1933, had not yet been drawn up, as the form of the order had not been agreed. On the 14th February, 1933, the solicitor for the chargees applied by summons to settle the form of the order before the Judge. The application was served on Mr. Coomarasamy, who was then the solicitor on the record for the first and second appellants, and on the 21st February, 1933, the application was heard, and without objection on the part of the second appellant or his solicitor, the order of the 16th February was settled in the following form:—

> "Upon hearing S. Seenivasagam counsel for the chargees applicants, the respondent No. 1 (*i.e.*, appellant No. 1) in person, the respondent No. 2 (*i.e.*, appellant No. 2) by his attorney," etc.

Dealing with the question of jurisdiction, there are two propositions of law which are quite incontrovertible; the first is that the Court has no jurisdiction over any person who is not properly brought before it, *In re Shephard*, 43 Ch. D. 131, and the same principle has been applied to a foreign judgment *in personam* when the judgment has been pronounced *in absentem* and the defendant has not in any way submitted to the jurisdiction: *per* Lord Selborne in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote*, (1894) A.C. 670. The second proposition which is equally clear is that a defendant, although under no obligation to do so, may voluntarily submit to the jurisdiction. Even when defendants have appeared and objected to the jurisdiction of a foreign Court and failing success on that plea asked for judgment on the merits, the appearance has been held voluntary and to bind the defendants in the very proceedings to which they objected: *Boissiere* v. *Brockner*, 6 T.L.R. 85.

The question then arises as to which of these two principles apply to the facts of the present case. Under the provisions of the Civil Procedure Code which were in force at the time that these proceedings were brought, no appearance by defendant was necessary, but the second appellant in effect entered an appearance by getting the power of attorney registered, engaging a solicitor and entering an appeal. If the only object of these various steps was to get rid of a judgment pronounced against him *in absentem*, he might have been considered as having appeared under protest, but if that had been the only object his proper course, as I have said, was to apply to the Court to have the judgment set aside, an application in which he must have succeeded. The reason, however, why he appealed was that he objected to the judgment not only or even primarily because of the technical want of jurisdiction, but because certain provisions of the Land Code upon which the application was founded had not been complied with. In other words, he appealed because he wanted to attack the judgment on the merits, and took the chance of a judgment in his favour. The inevitable conclusion, therefore, is that the second appellant's action in appealing amounted to a voluntary appearance and not to an appearance under protest. Any doubt on the subject is set at rest by the second appellant having voluntarily assented to the order of the 16th January, 1933, being settled by his solicitor in such a form as to amount to an unqualified admission that he had in fact submitted to the jurisdiction.

In the case of *Molony* v. *Gibbons*, 170 E.R. 1232, the Court of King's Bench enforced a judgment obtained by default against the defendant in Jamaica, where the judgment recited as follows:—

> "And the said J. Gibbons, by J. Ferrier, his attorney, comes and defends the wrong and injury....and says nothing in bar or preclusion of the said action of the said J. Molony," etc.

The Court refused to entertain the objection that there was no evidence that Ferrier was properly constituted the defendant's attorney. This case appears to me to apply *a fortiori* when a defendant has voluntarily assented to a recital in a formal judgment that he was in fact represented at the hearing by his attorney.

In the case of *Guiard* v. *De Clermont and Donner*, (1914) 3 K.B. 145, the plaintiffs had obtained a default judgment in France, and if the defendants had refused to do anything, their position would have been unassailable, and they could not have been sued upon such judgment in England. Ultimately, however, the defendants filed an 'opposition.' This is similar to filing an objection to an attachment under section 279 of the Civil Procedure Code. As a result, the case was re-heard, and the defendants succeeded but lost on appeal, and the original default judgment was affirmed. It was held that the judgment was enforceable against them as, by their subsequent conduct they had submitted to the jurisdiction and by their 'opposition' had taken the chance of obtaining judgment in their favour on the merits.

I think that the same principles apply here. The second appellant took his chance of succeeding upon certain technical defences under the Land Code, and for that reason came before the Court. Accordingly he appeared voluntarily and submitted to the jurisdiction.

His objection to the jurisdiction must, therefore, fail, and as a result of the admissions contained in the recital to the order of the 16th of January, 1933, he must be deemed to have been present at the hearing on that day, when he was in fact present by his attorney under the unregistered power. In the circumstances he must also be deemed to have waived the irregularities under the Land Code which, as I have said, were capable of being waived, and to which he offered no objection. I think, therefore, that the order appealed from cannot now be questioned by him.

There is, however another ground upon which I think the appeal should be dismissed. The first two grounds of the appeal are based on technical objections which could have been, but were not, raised in the Court below. The appeal has no merits whatever, as both the appellants were fully aware of the steps that were being taken to enforce the charge. In these circumstances, section 31 of the Courts Enactment applies. That section provides that no decree shall be reversed etc., on account of any error, defect, or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court.

I have held that there are no merits, and that the second appellant has submitted to the jurisdiction. The case is, therefore, governed by the decision in *Davis* v. *Galmoye*, 39 Ch. D. 322. In that case, on appeal, it was argued that an application for leave to issue a writ of attachment should have been made by motion in open Court, and not by summons. The Court of Appeal agreed that this was so, but as the objection had not been raised in the Court below, and had no merits, the appeal was rejected.

On this ground also, therefore, I would dismiss the appeal with costs, and direct the deposit to be paid out to the respondents' solicitor.

WHITLEY, J.—The land in question in this case was charged by Lin Pui Yew the surviving Executrix and representative of the Estate of Low Foo deceased to the Bank of Malaya Limited and subsequently transferred by her to the appellants subject to the charge. The transfer was duly registered and accordingly by the definition in section 2 of the Land Code 1926 the appellants as registered proprietors for the time being were thenceforward the Chargors for the purposes of the Code.

On the 31st March, 1932, default was made in payment and on the 19th September, 1932, the chargees took the first of the steps which are conditions precedent to obtaining an order for sale, by sending to the original chargor and to the appellants a notice of demand under section 138 of the Code. This notice ought to have been given to the appellants as the registered proprietors but it was headed

"To Lin Pui Yew chargor" and it contains no reference to the appellants.

The first ground of appeal is that this was not a proper notice under section 138. Before considering this point it will be convenient to summarize the subsequent proceedings.

The first appellant was duly served but the copy of the notice sent by registered post to the second appellant at Penang was returned undelivered. This is no evidence that any further effort was made to serve him by any of the alternative methods provided by sub-sections (ii), (iii) or (iv) of section 138 and recourse was had to the method provided by sub-section (v) by posting a copy on the land. This is the foundation for the second ground of appeal namely that the notice was not properly served upon the second appellant.

Subsequently on the 13th December, 1932, the chargees respondents took out a summons under section 149 of the Code to apply for an order for sale. Apparently this summons was served upon Leong Yoon Yin the attorney of the second appellant in Penang as that lady appeared at the hearing on the 16th January, 1933. This is the foundation for the third ground of appeal namely that as the power of attorney in the Colony had not been registered in the Federated Malay States the attorney could not accept service or appear for the second appellant in Ipoh.

At the hearing the first appellant appeared in person, Leong Yoon Yin appeared as attorney for the second appellant and Mr. Coomarasamy appeared for the original chargor. Mr. Coomarasamy's only interest was to point out that his client had been brought to Court unnecessarily and he obtained an order for her costs. None of the parties raised any of the technical objections subsequently put forward on appeal. It was apparently mentioned that the power of attorney given by the second appellant had not been registered in the Federated Malay States and Mr. Seenivasagam for the chargees waived any objection on that ground.

The usual order for sale was made. On the 7th February presumably with a view to appeal Leong Yoon Yin registered her power of attorney and on the 9th February the appellants gave notice of appeal and appointed Mr. Coomarasamy as their solicitor.

On the 14th February a summons was taken out to settle the form of the order made on 16th

February and it was finally settled on the 21st February as follows:—

> "Before the Hon. Mr. Justice Geraghty in Chambers. This 21st day of February, 1933.
>
> "Upon hearing Mr. S. Seenivasagam of Counsel for the Chargees-applicants and Mr. K. M. Coomarasamy of Counsel for the respondents Nos. 1, 2 and 3 and upon reading the Summons in Chambers dated the 14th day of February, 1933.
>
> "It is ordered that the order made by this Court in Chambers upon the 16th day of January, 1933, be settled in the words following, that is to say
>
> "Upon hearing Mr. S. Seenivasagam of Counsel for the Chargees-applicants, the respondent No. 1 in person, the respondent No. 2 by his attorney and Mr. K. M. Coomarasamy of Counsel for respondent No. 3 and upon reading the Summons in Chambers dated the 17th day of December, 1932, and the affidavit of Mr. S. Seenivasagam sworn to on the 13th day of December, 1932, in support thereof and filed herein;
>
> ....."

From this it appears that both appellants were represented by counsel when the order was finally settled.

I return now to the first ground of appeal. It is clear that the notice of demand does not comply with the requirements of section 138. It should have been addressed to the appellants as the registered proprietors of the land and not to the original chargor. But the case of *S. R. M. M. A. Supramaniam Chetty* v. *S. P. Mohamed Ibrahim*, 3 F.M.S.L.R. 91, establishes that an irregularity such as this does not necessarily vitiate the whole of the proceedings. That case was prior to the enactment of the Land Code and was decided under the Registration of Titles Enactment, 1911, from section 46 of which section 138 of the Land Code has been taken with variations. Under section 46 notice had to be given to the person who created the charge and in that case the notice was by mistake addressed to the transferee. It was held that in the circumstances the irregularity was not such as would vitiate the proceedings but the learned Judges were careful to point out that no general rule could be laid down and that in considering the effect of such an irregularity regard must be had to the circumstances of each particular case. The real test to be applied is whether there has been a substantial compliance with the law on account of the situation and relation of the parties. I am of opinion that if a notice defective only in this particular was properly served upon a registered proprietor though not addressed to him and he duly appeared at the hearing that proprietor could in no way be prejudiced by the defect in form and on the principle laid down in the case referred to there would be no sufficient ground to set aside the order against him. That disposes of the case of the first appellant who though not named in the notice was duly served and appeared in person and I would dismiss his appeal.

The case of the second appellant presents more difficulty. As regards service of the notice section 138 provides various alternative modes of service. The chargees made use of the last mode—posting on the land—which was only open to them if the notice could not be given by one of the other modes provided and there is nothing in the affidavits to show that notice could not have been so given. Posting on the land is a last resort, being the least satisfactory method and one only to be used *faute de mieux* when all others have failed.

So far then there is no proper evidence of service upon the second appellant. That could be cured if he appeared upon the hearing of the summons and waived objection but he did not. His attorney purported to appear on his behalf but she had not registered her power of attorney under section 3 of the Powers of Attorney Enactment, 1912, and consequently had no standing whatsoever. Accordingly when the order was made against the second appellant on the 16th January it was made in his absence and the Court has no jurisdiction inherent or otherwise over any person other than those properly brought before it. *Brydges* v. *Brydges*, (1909) P. 187, *per* Farwell, L.J., at page 191. Up to that point he was clearly not bound by this order which had been made against him in his absence and he could have applied to have it set aside. As Cotton, L.J., observed at the close of his judgment in *re Shephard*, L.R. 43 Ch. D. 131, it is against all principle to make an order against a person until he has been brought before the Court or all proper steps to bring him before the Court have been taken ineffectually.

If the order had been passed and entered without further reference to the Court the second appellant's appeal. must have been allowed although I think the more appropriate remedy for him would have been a motion to set aside the order. But the matter came before the Court again on 21st February when the form of the order was finally settled. On that day the power of attorney had been duly registered and the attorney was represented by counsel so that the second appellant was properly before the Court.

Prima facie that would appear to dispose of the matter but it was argued that his appearance on the 21st February cannot operate as a waiver when he had already lodged an appeal and it was this argument which has occasioned me most difficulty. I have been unable to find any case precisely in point but that of *Mayer* v. *Claretie*, 7 T.L.R. 40, has certain points of resemblance. In that case the defendants from the first denied the jurisdiction but they appeared to the writ and put in a defence under threats that judgment would be signed against them unless they did so. At the same time they wrote to the plaintiff's solicitor protesting against the jurisdiction. It was held by Mathew, J., and Grantham, J., that appearance under those circumstances was no waiver of their objection to the jurisdiction and that they had not attorned to the jurisdiction. It might be argued that in the present case the notice of appeal lodged by the second appellant on the 9th February was tantamount to a protest and that his appearance on the summons on the 21st February must be taken to have been under protest and that therefore there was no waiver of his objection. I think however that the cases are clearly distinguishable. In the reported case the defendants had protested from the beginning and had throughout done everything in their power to voice their protest. They had been guilty of no laches. In the present case the second appellant had his opportunity on the 21st February but he did not avail himself of it. He did not object that he was not before the Court on the 16th January and that the order which was being settled in his presence on the 21st February wrongly set out that he had appeared by his attorney on the 16th January. That being so he must in my opinion be taken to have submitted to and admitted jurisdiction.

The fact that he eventually did appear and appeal brings him also I think within the principle laid down by Lawrence, J., in *Guiard* v. *De Clermont*, (1914) 3 K.B. 145. In that case judgment by default was obtained in a French Court against the defendants who could successfully have objected to the jurisdiction. At first the defendants refused to come within the jurisdiction and as long as they maintained that attitude as Lawrence, J., observed their position was unassailable. But when the plaintiff obtained the French equivalent of our garnishee order *nisi* the defendants filed an "opposition," got the case reheard and appeared by solicitors and advocate. They succeeded on the rehearing but lost on appeal. It was held that the judgment was enforceable in England inasmuch as the defendants had voluntarily submitted to the jurisdiction and took the chance of obtaining a judgment in their favour.

It is suggested that there are any merits in this appeal but I have thought it desirable to go somewhat fully into the technical points raised as I am of opinion that the requirements of the Land Code as to the steps to be taken by a chargee before obtaining an order for sale under section 149 ought to be scrupulously complied with and that any irregularities should be carefully scrutinized before being excused.

I would dismiss both appeals with costs.

MCFALL, J.—On 19th October, 1927, Lin Pui Yew, as surviving executrix and representative of the estate of Low Foo deceased, charged the land held under Certificate of Title No. 7589, township of Ipoh, District of Kinta, to the Bank of Malaya Ltd., of Ipoh, the present respondent-chargees, to secure $25,000 lent her on 2nd April, 1927: repayable on 31st March, 1932.

On 24th February, 1930, the land was registered in the names of Lau Yau Weng and Lau Yau Chi, as proprietors, subject to the charge. Presumably the new proprietors paid interest on the charge up to 1st March, 1932, but this is nowhere stated.

On 31st March, 1932, the chargor defaulted in payment.

On 9th May, 1932, the Bank went into voluntary liquidation.

On the 19th September, 1932, the liquidator sent to (1) Lau Yau Weng, (2) Law Yau Chi, the appellant-chargors, and (3) Lin Pui Yew notice of demand under section 138, Land Code 1926. The notice was addressed to Lin Pui Yew of Ipoh.....chargor. Elsewhere in the notice occur "whereas you the chargor have made default.....give to you the chargor notice to pay....." The notice is inscribed at the top schedule XXIX.

This notice was served on Lau Yau Weng by registered post on 21st September, 1932.

This notice was sent to Lau Yau Chi at Penang, but it was returned undelivered by the Post Office authorities, and on the 26th day of September, 1932, at 4.46 p.m. Chow Thin Fook, secretary to the said Bank, had a copy of the said notice posted in the said land: his affidavit sets out this fact.

This notice was served by post on Lin Pui Yew at 24, Belfield Street, Ipoh, on 21st September, 1932.

Default continued.

The Bank applied by Summons in Chambers dated 13th December, 1932, supported by affidavit of S. Seenivasagam for an order for sale of the charged land, the amount then due being $26,355.

There is nothing in the present record to show how this summons was served on any of the three appellant-chargors.

At the hearing on the 16th January, 1933, Seenivasagam appeared for the chargees, first

chargor (Lau Yau Weng) in person; Madam Leong Yoon Yin appeared as attorney for second chargor, and Coomarasamy for the third chargor.

First chargor-appellant at the hearing raised no objection to the notice of demand.

Order for sale was made and for chargee to pay $25 costs of third respondent, *i.e.*, Lin Pui Yew, who had been summoned unnecessarily.

On the 7th February, 1933, Leong Yoon Yin registered her power of attorney in the Federated Malay States.

On 9th February, 1933, first and second appellant-Chargors gave notice of appeal, Lau Yau Chi, by his attorney Leong Yoon Yin, Power of Attorney No. 52/33, being the signature of second appellant to that notice.

On the 21st February, 1933, on a summons dated 14th February, 1933, the Court "upon hearing.....Mr. K. M. Coomarasamy of counsel for the respondents Nos. 1, 2 and 3.....it is ordered that the order of 16th January, 1933, be settled in the words following....." made an order settling the order of 16th January, 1933.

In the appeal, it was contended for the first appellant-chargor that he had not been served validly with a notice in writing under section 138, Land Code, 1926, as the notice served was directed to Lin Pui Yew and not to himself or to himself and second appellant-chargor as section 138 requires.

Section 138 lays down that the chargee may give to the chargor notice in writing. "Chargor" means the registered proprietor of charged land.

Schedule XXIX to the Land Code, 1926, runs as follows: ".....To.....Chargor of the land held under.....whereas.....registered a charge by you.....and whereas you the chargor..... have made default. Now therefore I.....give to you.....the chargor under the said charge notice....." Difficulty seems to arise from the words "registered a charge by you....." In reality there is none. When the chargor has continued registered proprietor of the charged land the form in schedule XXIX is correct. Where the land has been transferred subject to a charge the notice is addressed to the chargor, *i.e.*, to the new registered proprietor, and the words "by you" should be struck out, and the name of the person who originally made the charge substituted. In the present case for "you" should have been substituted "Lin Pui Yew." The notice should have been directed "To (1) Lau Yau Weng, (2) Lau Yau Chi, chargors of the land....." The notice served in fact misstates in saying that Lin Pui Yew was then chargor of the land: she was not. Section 138, sub-section (ii) allows the adoption of the form in Schedule XXIX in the way above suggested.

It was contended for second appellant that he had not been served validly with this notice such as it is. S. Seenivasagam in his affidavit of 13th December, 1932, states that the notice to the appellant No. 2 was sent to him at Penang, but it was returned undelivered by the Post Office authorities, and on the 26th day of September, 1932, at 4-46 p.m., Chow Thin Fook, secretary to the said Bank, had a copy of the said notice posted on the said land. Chow Thin Fook in his affidavit states "I personally went to the land.....and had a copy of the notice.....posted on the said land at 4-46 p.m. on the 26th day of September, 1932.." Now section 138 lays down (1) that the chargee may give the notice to the chargor, (2) alternatively chargee may leave the notice at last known place of abode or business of the chargor, (3) if the chargor is absent from the Federated Malay States or cannot be found the chargee may leave such notice with the attorney of the chargor and with any adult member of his family who is residing with him, (4) if the notice cannot be given as aforesaid the chargee may give such notice by posting it upon the land charged. Before posting of the notice upon the land can be held to be effective service methods (1), (2), (3) of service above enumerated must be shown to have failed or become ineffectual. Here the chargee-respondent has taken method (4) and has not explained how he had exhausted methods (2) and (3) before taking (4). For this reason he had not satisfied the Court that the service of notice on second chargor-appellant in this way is permissible or valid.

It was argued from the case reported at 3 F.M.S.L.R. 91, that the irregularity in the present notice of demand was not such as to vitiate the proceedings. Section 46 of the Registration of Titles Enactment, 1911, which entered into that decision re-appears, re-drafted in the form McCabe Reay, J., suggested at page 99 of the report, as section 138 of the Land Code, 1926. Section 138 lays down much more definitely the period of notice and the method of service, and Schedule XXIX provides a form which may be used and which the present respondent-chargee purports to have used in the present case. The Registration of Titles Enactment, 1911, prescribes no form of notice of demand. The trend of the legislation has been to more definite forms and procedure and to stricter observation of forms and procedure and against allowing informality and irregularity, and the Court must take knowledge of the aim of the legislature.

It was further contended for second chargor-appellant that the service of the Summons in Chambers of 17th December, 1932, served on Madam Leong Yoon Yin at Penang on 20th December, 1932, she being second chargor-appellant's attorney in the Straits Settlements. but not in the Federated Malay States, as her

power of attorney had not then been registered in the Federated Malay States, was bad.

It is admitted by all parties that this summons was served on Madam Leong Yoon Yin as above alleged: that she appeared at the hearing on 16th January, 1933, and that her power of attorney was not then registered in the Federated Malay States.

The Powers of Attorney Enactment: Enactment 1/12: required that this power be registered before the attorney could act in the Federated Malay States validly for her principal. Without registration she was not her principal's recognized agent to accept service from Federated Malay States Courts or to appear for him therein. The service on her at Penang was a nullity, and her appearance in Court on 16th January, 1933, valueless so far as binding (2) Lau Yau Chi was concerned.

It was suggested that second appellant-chargor by appearing on 21st February, 1933, to settle the order of 16th January, 1933, waived the irregularities in the notice of demand and in the service of the summons.

It was the chargee-respondent who has taken the step by serving the appellant-chargors with summons to appear on 21st February, 1933, to settle the order. Appellant-chargors had already lodged their appeals against the order of the 16th January, 1933, such as it was. It was to their interest when served to appear and see that the terms of the order against which they were appealing was settled in accordance with the actual decision of the Judge. It was not their intent to waive their objections to it or condone the irregularities leading up to it. They did not discontinue their appeal. I am of opinion that by his appearance to settle the order of 21st February, 1933, the second appellant-chargor did not submit to the order or waive the irregularities.

I am of opinion that first appellant-chargor having failed to contest the validity of the notice of demand before the Court on 16th January, 1933, cannot raise it in this appeal: and that his appeal should be dismissed with costs.

I am of opinion that second appellant-chargor was served with an invalid notice of demand, and that he was never served with the summons, nor appeared to it on 16th January, 1933, and that the order of sale made against him should be set aside and that his appeal should be allowed. This appellant's case presents no merits: he appeals on technicalities: I would therefore make no order for the costs of his appeal.

Appeal dismissed.